

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	<b>MB Docket No. 08-82</b>
	)	
	)	<b>CSR-7947-Z</b>
Motion Picture Ass'n of America, Inc.	)	
	)	
	)	
<b>Petition for Waiver of</b>	)	
<b>47 C.F.R. § 76.1903</b>	)	

**Reply Comments of Thomas D. Sydnor II  
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of the Progress & Freedom Foundation**

In the captioned proceeding, the Motion Picture Association of America, Inc., (MPAA), on behalf of its member film studios, has petitioned for a waiver of certain provisions of 47 C.F.R. § 76.1903 that prohibit multi-channel video programming distributors, (MVPDs) from activating the selective output control (SOC) functionality now provided in most modern home-entertainment systems (the Petition).

When the Commission enacted its SOC-related regulations in 2003, it admitted that the question of whether to prohibit the activation of SOC functionality “involves a difficult balancing of interests.” *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20885, 20911 (2003). Nevertheless, the Commission concluded “that at present the balance tips in favor of prohibiting the used of [SOC] by MVPDs....” *Id.* The Commission noted that the transition toward digital television could begin only if early adopters were willing to buy then-expensive DTV equipment having only “component analog inputs for high definition display.” *Id.* The Commission thus decided to enact a default prohibition on activating SOC functionality in order to ensure that these early adopters could access “the high definition content they expect to receive.” *Id.*

But the Commission also recognized that it might need to waive the prohibition against activating SOC functionality in order to facilitate the delivery of content that early-adopters could *not* have expected to receive back in 2003: “We ... recognize that selectable output control functionality might have future applications that could potentially be advantageous to

consumers, such as facilitating new business models, and will consider waivers, petitions, or other proposals to use selectable output control in this regard. *Id.* at 20912. In particular, the Commission noted that MPAA had argued that SOC functionality could be needed to “protect high value content,” *id.* at 20912 n.158, and that “access to high value digital content will spur the transition [to digital television],” *id.* at 20909.

In 2003, the Commission thus recognized that it should grant waivers of its default prohibition against the activation of SOC functionality when doing so “could potentially be advantageous to consumers” by “facilitating new business models,” particularly those that would deliver the sort of “high value digital content” that could “spur the transition” toward digital television.”

The MPAA Petition proposes that the Commission should waive the default prohibition against activating SOC functionality in order to facilitate the development of new business models for delivering high-value content that is not now legally available to most home viewers. Regrettably, some commenters oppose the MPAA Petition *because* they suspect that the services proposed in the Petition *would* facilitate new business models for delivering high-value content that *would* prove to be advantageous to consumers. But that is precisely why MPAA’s Petition should be granted.

### **SOC-Based Business Models That Enable Legal Home Viewing of Feature Films in Current Theatrical Release Would Be Highly Advantageous to Many Consumers.**

The economist Joseph Schumpeter once noted that market incentives turn the luxuries of a few elites into commodities for the masses. *See* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 67 (3d ed. 1950). As he saw it, markets matter not because they once encouraged a few craftsmen to make the stockings that warmed the legs of Queen Victoria, but because market incentives encouraged creators to make stockings so inexpensive and ubiquitous that they were soon worn even by “factory girls.” *Id.* In the MPAA Petition, film studios seek permission to do something quite similar.

Once, home viewing of a feature film in current theatrical release was a privilege available only to “to actors of major stature on rare occasions,” (and even they were prohibited from copying or redistributing films thus provided for their mansion viewing). *See, e.g., United States v. Wise*, 550 F.2d 1980, 1992 (9<sup>th</sup> Cir. 1977) (discussing “V.I.P. Contracts” between studios and star actors like Vanessa Redgrave and Robert Redford). Back then, everyone else had to watch films in theaters, or wait many years and then be home at the right time in order to watch them again on network television.

Today, the range of owning and viewing options available to ordinary consumers has expanded dramatically: Major studios now tend to release feature films through a so-called “windowing” strategy that makes films available in different ways and venues at different times. While the windowing strategy used can vary from film-to-film and between studios, current strategies often proceed as follows. First, the film is made available in theaters. Second, the film is released on DVD. Third, the film is then undergoes a staged release in various television venues, usually pay-per-view, then on “premium” movie channels, then on network television, and finally, in syndication. *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 118 (7<sup>th</sup> ed. 2007).

Nevertheless, even today, release for home-television viewing usually does not occur until the third step in this windowing process—usually many months after a film’s theatrical release. SOC-enabled business models thus represent another step forward: They could soon provide millions of consumers with privileges once available only to the likes of Vanessa Redgrave, Robert Redfor, or, perhaps, the Queen of England. Predictably, legal home viewing of recently released films would offer obvious advantages to many consumers.

- Lower Costs and Reduced Complexity: The financial and opportunity costs of theatergoing make it obvious that home-viewing of recently released films might significantly decrease the costs and inconveniences now inherent in viewing recently released films. For many families, a visit to the theater means paying to find, hire, and transport a babysitter, paying again to drive to the theater and park, paying yet again to buy admission to a theatrical showing of a film, and then paying even more for expensive sodas and popcorn. When the direct financial costs alone are totaled, the costs of seeing a single film can easily exceed \$100 for two adult parents.
- Legal Options for Home Viewing of Recent Films: Today, home viewing of recently released feature films is—or may soon be—an *legal* option only for those who have purchased either current-generation videogame consoles or dedicated IP-based equipment. For most consumers, such content is available for home viewing only if it is downloaded *illegally*, usually with popular so-called “peer-to-peer” file-sharing programs. But for consumers, illegally acquired content can have a very high price. Unfortunately, many distributors of popular file-sharing programs have pursued piracy-based business models so relentlessly that they have managed to generate something unprecedented—copyright enforcement against consumers. Even

worse, even in the most extreme circumstances—even when distributors of copying devices *intend* to encourage or dupe consumers into infringing copyrights—groups like Project Gutenberg, the Internet Archive, the ACLU, and various associations of librarians have argued that distributors should be allowed to deliberately build piracy-based business models based because copyright owner can just sue—or the Department of Justice can just imprison—all of the consumers that distributors induce to infringe. The Supreme Court has rejected the worst of these arguments, *see MGM Studios, Inc v. Grokster, Ltd.*, 545 U.S. 5193 (2005), but their effects still linger.

Nevertheless, every new business model—particularly those that might actually succeed—will be opposed. Consequently, it is interesting to note that commenters opposing the MPAA Petition tend to do so—not because SOC-based home-viewing of recently released feature films might not be “potentially advantageous to consumers”—but because they fear that it could prove to be very advantageous to consumers. Fortunately, the diametrically opposed interests of those who oppose the Petition make the task of triangulating their clashing claims relatively easy.

On the one hand, owners of movie theaters oppose the Petition because they fear that legal home viewing of recently released films could diminish their revenues. *See generally* Such concerns appear speculative. Analysts have noted that the increasing quality of the home-viewing experience may eventually undermine the business model of operators of movie-theater owners. *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 118 (7<sup>th</sup> ed. 2007). Nevertheless, at least for persons of ordinary means, it seems unlikely that the home-viewing experience is truly comparable to the theatrical-viewing experience. As a result, it seems possible that home-viewing of recently released feature films might well increase the overall audience for such films without significantly decreasing box-office receipts at movie theaters.

On the other hand, certain public-interest groups oppose the Petition because they argue that granting it could trigger either consumer confusion or a series of ever-more speculative events that might eventually give film studios enough leverage to enforce draconian rules upon distributors of consumer-electronics equipment. These concerns must be deemed even more speculative because they fail to acknowledge the reality that even theater owners acknowledge—the present prevalence of digital piracy.

## **Conclusion.**

In 2003, the Commission enacted encoding rules intended to provide the incentives needed to generate the early-adopter behavior that has subsequently occurred and facilitated the transition toward DTV. When doing so, the Commission explicitly noted that it might need to waive its default prohibition against activating SOC functionality in order to facilitate the development of new business models that would increase access to high-value content, and thus be potentially advantageous to consumers. For those reasons, the Commission should grant the MPAA Petition.

I hereby certify that copies of the preceding have been served upon counsel for Petitioners.

//s Thomas D. Sydnor II